Romi Amora bin Amir v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO J-05–27 OF 2009
SURIYADI, HASAN LAH AND SULAIMAN DAUD JJCA
1 NOVEMBER 2010

Criminal Law — Dangerous drugs — Trafficking — Appeal against conviction and sentence — Cannabis found under driver seat of taxi — Whether appellant had knowledge of drugs — Whether trial judge had drawn inference less favourable to appellant in establishing ingredient of trafficking — Whether strong views of trail judge had amounted to serious misdirection — Whether appellant could have knowledge of contents of package even if he had seen it — Whether appellant succeeded in rebutting presumption of trafficking — Dangerous Drugs Act 1952 ss 6 & 39B(1)(a)

Acting on information received Chief Inspector Zambri bin Razab ('the CI') and two other police personnel conducted a surveillance at Jalan Tebrau Taman Kim Teng Park, Johor Bahru. While lying in wait, the police team observed Romi Amora bin Amir ('the appellant') arriving in a taxi that he was driving, alighting from it and making his way towards a row of shops. The police who were following the appellant apprehended him and arrested him after introducing themselves as police officers. A body search revealed that the appellant was carrying a small packet containing dried plant material ('P13'), while the search of the taxi the appellant arrived in revealed a plastic bag containing a compressed slab of plant material wrapped with a plastic package on the outer layer and an aluminum foil on the inner layer ('P9') under the driver's seat. When the contents of P9 and P13 were analysed they were confirmed by the chemist to be cannabis. P13 was found to contain 0.7g of cannabis while P9 was found to contain cannabis weighing 466.4g. The appellant was charged with two offences, namely the offence of trafficking in 466.4g of cannabis (the first charge), under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act'), and the offence of having 0.7g of cannabis in his possession ('the second charge'), under s 6 of the Act. In the course of the trial, evidence was adduced that the taxi was rented to one Razali bin Omar ('Razali') by the owner of the taxi and that the appellant had borrowed the taxi from Razali on the date of his arrest on the pretext that his taxi had broken down and he needed to pick up some passengers. The trail judge found that although the appellant had borrowed the taxi in which P9 was found he was the only person who alighted from the taxi. As such the trial judge concluded that the appellant had custody and control of the taxi together with P9, and thus had knowledge of the cannabis found under the driver's seat, which was the subject matter of the first charge. As for the second charge, the trial judge found that since P13

was found on the body of the appellant when he was arrested he could not deny knowledge of it. Based on such evidence the trial judge was satisfied that a prima facie case had been established for both charges by the prosecution and called for the defence. At the end of the case the trial judge found the appellant guilty of both charges and convicted him of both charges. In respect of the first charge he was sentenced to death whereas for the second charge he was sentenced to a one year imprisonment. This was the appellant's appeal against his conviction and sentence.

Held, allowing the appeal against the first charge and dismissing the appeal against the second charge:

(1) From the grounds of judgment it was obvious that the trial judge held the erroneous view that the appellant knew of P9 being under the driver's seat. In arriving at this conclusion, the trial judge had in effect chosen to ignore the evidence of the CI who testified that P9 could have been inserted from the rear part of the driver seat. Instead by choosing to go with the view that P9 could also be inserted from the front side of the driver seat and by refusing to submit to the CI's testimony, the trial judge had failed to draw the inference that was more favourable to the appellant. Further, by stating that it was impossible for any passenger to leave P9 under the driver seat since that space was not meant for passengers to keep their things the trial judge had in effect chosen to ignore the fact that no less than four passengers were picked up within those few hours by the appellant when plying his trade before being arrested. In the circumstances, the strong views held by the trial judge regarding the abandoning of P9 under the driver seat by a passenger amounted to a serious misdirection. In addition, the trial judge's view of equating the appellant's act of adjusting the driver's seat with his capability of seeing P9 that was under the seat was also a view that lacked substance. As such, the prosecution had failed to establish that the appellant knew that P9 was under the driver seat of the taxi and it would naturally follow that he would not know its contents (see para 12(a)–(c)).

(2) Even if the appellant had seen P9 this did not necessarily mean that he knew its contents. Making a statement that the appellant had possession of P9 just because it was under the driver seat and that he was the sole driver of the taxi, was a bare statement without more. As P9 was wrapped with a plastic package on the outer layer and aluminum foil on the inner layer there was nothing to indicate that the cannabis that it contained could be seen by the naked eye. Thus with the benefit of the doubt given to the appellant, it would mean that only the package could be seen and not its contents. As such, the prosecution had failed to establish the ingredient of possession in relation to P9 (see paras 15–16).

(3) The case of *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ 1 (*Abdul Rahman Akif*'s case) that was referred to by the prosecution to establish that the appellant had knowledge of P9 could be distinguished from the present appeal. In the present appeal the appellant had borrowed the taxi for only three hours and 20 minutes but in *Abdul Rahman Akif*'s case the accused had been in possession of the vehicle for some seven months before his arrest. Another distinguishing factor was that the vehicle in question in the present appeal was a taxi and the compressed slab could have been placed by any passenger when sitting at the rear passenger seat whereas in *Abdul Rahman Akif*'s case the issue of any member of public entering the vehicle and leaving any package did not arise (see para 18).

(4) When the appellant was arrested he was walking away from the drugs and as such in passive possession, even though the amount of drugs was above the presumptive level. At that point there was no tell-tale sign of overt act, conduct or evidence which could upgrade that possession to trafficking (see para 19).

(5) The appellant had rebutted the presumption of trafficking on a balance of probability. With knowledge not established and the ingredient of trafficking easily rebutted the first charge ought to be set aside. However, the second charge of possession was affirmed (see para 20).

[Bahasa Malaysia summary

Bertindak atas maklumat yang diterima Ketua Inspektor Zambri bin Razab ('KI') dan dua pegawai polis telah melakukan pengawasan di Jalan Tebrau Taman Kim Teng Park, Johor Bahru. Semasa menunggu, pasukan polis memerhati Romi Amora bin Amir ('perayu') telah tiba dengan teksi yang dipandunya, keluar daripadanya dan menuju ke arah sebaris kedai. Polis yang mengekori perayu telah menahannya dan menangkapnya selepas memperkenalkan diri mereka sebagai pegawai polis. Pemeriksaan badan mendapati bahawa perayu membawa sebungkus kecil mengandungi bahan tanaman kering ('P13'), manakala pemeriksaan ke atas teksi yang dipandu perayu menjumpai beg plastik mengandungi papak mampat bahan tanaman yang dibungkus dengan beg plastik di bahagian luar dan kerajang aluminium di bahagian dalam ('P9') di bawah tempat duduk pemandu. Apabila kandungan P9 dan P13 dianalisa kedua-duanya disahkan oleh ahli kimia sebagai kanabis. P13 didapati mengandungi 0.7g kanabis manakala P9 didapati mengandungi kanabis seberat 466.4g. Perayu trelah dituduh kerana dua kesalahan, iaitu kesalahan pengedaran kanabis seberat 466.4g ('pertuduhan pertama'), di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta'), dan kesalahan memiliki 0.7g kanabis ('pertuduhan kedua'), di bawah s 6 Akta. Semasa perbicaraan, keterangan yang dikemukakan menunjukkan bahawa teksi itu disewa oleh Razali bin Omar ('Razali') oleh pemilik teksi itu dan bahawa perayu telah meminjam teksi itu daripada Razali pada tarikh

tangkapannya dengan alasan bahawa teksinya telah rosak dan dia perlu mengambil beberapa pelanggan. Hakim bicara mendapati bahawa meskipun perayu telah meminjam teksi yang mana P9 didapati seorang sahaja yang turun daripada teksi itu. Oleh itu hakim perbicaraan membuat kesimpulan bahawa perayu mempunyai jagaan dan kawalan teksi bersama dengan P9, dan oleh itu mempunyai pengetahuan tentang kanabis yang dijumpai di bawah tempat duduk pemandu, yang merupakan perkara pokok pertuduhan pertama. Berhubung pertuduhan kedua, hakim perbicaraan mendapati bahawa oleh kerana P13 dijumpai atas badan perayu semasa dia ditangkap dia tidak boleh menafikan pengetahuan tentangnya. Berdasarkan keterangan sedemikian hakim perbicaraan berpuas hati bahawa kes prima facie telah dibuktikan untuk kedua-dua pertuduhan oleh pihak pendakwaan dan memanggil pembelaan. Di akhir kes hakim perbicaraan mendapati perayu bersalah terhadap kedua-dua pertuduhan dan mensabitkannya untuk kedua-dua pertuduhan tersebut. Berhubung pertuduhan pertama dia telah dijatuhkan hukuman mati manakala pertuduhan kedua dia dijatuhkan hukuman satu tahun penjara. Ini adalah rayuan perayu terhadap sabitan dan hukumannya.

Diputuskan, membenarkan rayuan terhadap pertuduhan pertama dan menolak rayuan terhadap pertuduhan kedua:

(1) Berdasarkan alasan penghakiman adalah jelas bahawa hakim bicara telah memutuskan pendapat yang salah yang mana perayu mengetahui tentang P9 berada di bawah tempat duduk pemandu. Untuk tiba kepada kesimpulan ini, hakim bicara mempunyai pilihan untuk tidak mengambilkira keterangan KI yang telah memberi keterangan bahawa P9 mungkin telah diletakkan di bahagian tempat duduk belakang. Hakim perbicaraan yang tidak memilih untuk menerima pendapat bahawa P9 mungkin juga boleh diletakkan dari bahagian depan tempat duduk dan enggan menerima keterangan KI, beliau telah gagal untuk membuat inferens yang lebih berpihak kepada perayu. Selanjutnya, dengan menyatakan bahawa mustahil untuk mana-mana pelanggan meninggalkan P9 di bawah tempat duduk pemandu kerana tempat kosong itu tidak dimaksudkan untuk pelanggan-pelanggan meletak barang mereka, hakim perbicaraan telah memilih untuk tidak mengambilkira fakta bahawa tidak kurang daripada empat pelanggan telah diambil dalam tempoh masa beberapa jam tersebut oleh perayu semasa menjalankan perniagaannya sebagai pemandu teksi sebelum ditangkap. Dalam keadaan tersebut, pendapat kukuh yang diputuskan oleh hakim perbicaraan berhubung P9 yang ditinggalkan di bawah tempat duduk oleh penumpang membentuk salah arah yang serius. Tambahan pula, pendapat hakim perbicaraan yang menyamakan tindakan perayu mengubahsuai tempat duduk itu dengan keupayaannya melihat P9 di bawah tempat duduk itu juga satu pendapat yang tidak berasas. Oleh itu, pendakwaan telah gagal membuktikan bahawa perayu

A mengetahui bahawa P9 di bawah tempat duduk pemandu teksi itu dan sewajarnya ini diikuti bahawa dia tidak mungkin mengetahui tentang kandungannya (lihat perenggan 12(a)–(c)).

(2) Jikapun perayu telah melihat P9 ini tidak semestinya bermakna yang dia
B mengetahui kandungannya. Dengan membuat kenyataan bahawa perayu mempunyai milikan ke atas P9 hanya kerana ia di bawah tempat duduk pemandu dan bahawa dia satu-satu pemandu teksi itu, hanya satu kenyataan umum dan tidak lebih daripada itu. Oleh sebab P9 dibalut dengan bungkusan plastik di bahagian luar dan kerajang aluminium di
C bahagian dalam tidak ada apa-apa untuk menunjukkan bahawa kanabis yang terkandung di dalamnya boleh dilihat dengan mata kasar. Dengan itu atas faedah keraguan yang diberikan kepada perayu, ia bermaksud bahawa hanya bungkusan itu boleh dilihat dan bukan kandungannya. Oleh demikian, pendakwaan telah gagal membuktikan elemen milikan
D berkaitan dengan P9 (lihat perenggan 15–16).

(3) Dalam kes *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ 1 ('*kes Abdul Rahman Akif* ') yang telah dirujuk oleh pendakwaan untuk membuktikan bahawa perayu mempunyai pengetahuan tentang P9
E boleh dibezakan daripada rayuan ini. Dalam rayuan ini perayu telah meminjam teksi itu untuk hanya 3 jam dan 20 minit tetapi dalam kes *Abdul Rahman Akif* tertuduh memiliki kenderaan itu tujuh bulan sebelum tangkapannya. Satu lagi faktor yang membezakan adalah kenderaan yang dipersoalkan dalam rayuan ini adalah sebuah teksi dan
F papak mampat itu mungkin boleh diletakkan oleh mana-mana penumpang semasa duduk di tempat duduk belakang penumpang manakala dalam kes *Abdul Rahman Akif* isu mana-mana orang awam boleh masuk ke dalam kenderaan itu dan meninggalkan apa-apa bungkusan tidak timbul (lihat perenggan 18).

G (4) Semasa perayu ditangkap dia sedang berjalan meninggalkan dadah itu dan oleh itu mempunyai milikan pasif, meskipun jumlah dadah melebihi tahap anggapan. Di sini tiada tanda tindakan, perlakuan terang-terangan atau keterangan yang boleh menaik taraf daripada milikan kepada
H pengedaran (lihat perenggan 19).

(5) Perayu telah mematahkan anggapan pengedaran atas imbangan kebarangkalian. Oleh kerana pengetahuan tidak dibuktikan dan elemen pengedaran dengan mudah dipatahkan maka pertuduhan pertama patu diketepikan. Namun begitu, pertuduhan kedua tentang milikan
I disahkan (lihat perenggan 20).]

Notes

For cases on trafficking, see 4 *Mallal's Digest* (4th Ed, 2010 Reissue) paras 191–274.

Cases referred to

Balachandran v PP [2005] 2 MLJ 301; [2005] 1 CLJ 85, FC (refd)
Mat v PP [1963] MLJ 263 (refd)
Mohd Zaiham Mislan v PP [2010] 1 CLJ 1, FC (refd)
PP v Abdul Rahman Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (distd)
PP v Haling Arala Jimjani [2008] 5 MLJ 331; [2008] 4 CLJ 163, CA (refd)
PP v Abdul Rahman Akif [2007] 5 MLJ 1; [2007] 4 CLJ 337, FC (refd)
PP v Mohd Radzi Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457 (refd)
Warner v Metropolitan Police Commissioner [1968] 2 All ER 356, HL (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 2, 6, 39B(1)(a)

Appeal from: Criminal Trial No MT(93) 45–08 of 2000 (High Court, Johor Bahru)

Firus Jaffril (Firus Jafril, Aidil & Zarina) for the appellant.
Siti Rafidah bt Zainuddin (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Suriyadi JCA (delivering judgment of the court):

[1] The appellant was indicted with two charges. The first charge was for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') and the second offence under s 6 of the Act of having in his possession dangerous drugs punishable under s 12(2). The charges against the appellant read as follows:

The first charge

Bahawa kamu pada 24 Julai 2005, jam lebih kurang 4.20 pagi, di hadapan Kedai Wah Seng Cold Storage, Jalan Tebrau Kim Teng Park di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah merbahaya iaitu 466.40 gram Cannabis, dengan itu kamu telah melakukan suatu kesalahan di bawah s 39B (1)(a) of the Dangerous Drug Act 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

The second charge

Bahawa kamu pada 24 Julai 2005, jam lebih kurang 4.20 pagi, di hadapan Kedai Wah Seng Cold Storage, Jalan Tebrau Kim Teng Park di dalam daerah Johor Bahru, di dalam Negeri Johor Darul Ta'zim, telah didapati mengedar dadah merbahaya iaitu 0.70 gram Cannabis, dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 6 Akta Dadah Merbahaya 1952 dan boleh dihukum di bawah Seksyen dan Akta yang sama.

[2] The High Court found the appellant guilty and convicted him of both charges. For the first charge, he was sentenced to death whereas for the second charge, he was sentenced to one year imprisonment, with effect from the date of his arrest. The appellant then appealed to us against the decision of the High Court and we allowed the appeal against the first charge but not the second appeal.

[3] The brief facts of this appeal are as follows.

[4] On 24 July 2010, at about 3.10am acting on information received, Chief Inspector Zambri bin Razab ('PW5') together with two other police personnel conducted surveillance at Jalan Tebrau Taman Kim Teng Park, Johor Bahru. At about 4.20am PW5 saw a taxi bearing registration No HJ 6648 enter the surveillance area and park next to the row of shops there. PW5 and his men saw the appellant getting out of the taxi and walking towards the row of shops. They then followed him. On reaching Kedai Wah Seng Cold Storage PW5 stopped the appellant and simultaneously introduced himself as a police officer. The appellant was arrested and the police conducted a body search. In the appellant's left rear pocket PW5 found a small packet containing dried plant material suspected to be cannabis ('P13') and a bunch of keys with a remote control attached to it. By using the key and the remote control, PW5 opened the door of the taxi and searched the taxi. Under the driver's seat, he found a plastic bag containing a compressed slab of plant material suspected to be cannabis ('P9'). PW5 found that P9 was wrapped with transparent plastic package on the outer layer and an aluminum foil on the inner layer, attached together with a yellow colored cellotape.

[5] The government chemist, one Muhammad Yazid bin Ibrahim ('PW1'), analysed the plant material viz P13 and P9 and confirmed them to be cannabis as defined under s 2 of the Act. P9 found under the driver's seat weighed 466.40g and P13 weighing 0.70g.

[6] In the course of the trial, Zaharah binti Abdul Jalal ('PW2'), being the owner of the taxi, testified that she bought the taxi in 2002 but since then had rented it out to one Razali bin Omar ('PW3') for a monthly rental of RM400. PW2 testified that she never used the taxi and did not have any knowledge of any person who used the taxi on that particular date. PW3 in his evidence testified that he regularly drove the taxi to transport passengers. According to him, the taxi was always under his custody and when not plying for passengers always parked it at his house at No 48, Jalan Seroja 13, Taman Johor Jaya, Johor. He further testified that he had in his possession both the main and secondary keys. He regularly used the main key, with the secondary key being placed inside an unlocked drawer, at his house. PW3 admitted that the appellant was his friend. On 24 July 2010, at about 1am the appellant

borrowed the taxi from him at Restoran Tim Yam, Flat Larkin on the pretext that his taxi had broken down and had wanted to pick up some passengers. PW3 further testified that he sent the taxi to a car wash centre on 22 July 2005, and conceding not to have inspected or clean the interior part of the taxi, prior to handing it over to the appellant on 24 July 2005. He testified that he did not find any plastic bag inside the taxi when it was sent for cleaning at the car wash centre. He was unaware of passengers leaving anything inside the taxi or had received any request from them to place anything under the driver's seat.

[7] It was based on the above evidence and the following reasoning that the learned judge was satisfied that prima facie cases had been established for both charges by the prosecution, in that:

(a) When arrested P13 was found on the body of the appellant and could not be said to have not known of it. On this issue we found no error on the learned judge's conclusion.

(b) The appellant borrowed the taxi from PW3 prior to the arrest and therefore had custody and control of it, together with P9, which was the basis of the first charge.

(c) P9 ie the 466.40g of cannabis were found under the driver's seat of the taxi. The appellant was the only person who came out of the taxi.

(d) P9, was well wrapped in a transparent plastic package with a yellow cellotape attached to it. The court found that the appellant could see the packet through the plastic bag and that he had knowledge of the cannabis found under the seat.

(e) The prosecution had succeeded in proving the essential ingredients of custody, control and knowledge of P9. Knowledge here was established by direct evidence.

(f) The learned judge had also relied on the authority of *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ; [2007] 4 CLJ 3371 to support his decision.

(g) Being satisfied of the knowledge having been established for both charges the defence was called.

[8] In the notes of proceedings at p 45 of the appeal record, the learned judge said since the amount seized was 466.40g of cannabis, s 37(da) of the Act was therefore applicable. With all the material ingredients satisfied he then called for the defence. At the end of the case he found the appellant guilty of both charges and gave his reasons in the grounds of judgment. As said earlier we found no error over the conviction against the second charge ie of being in possession of P13. Our dissatisfaction was only as regards the first charge.

[9] It is observed that, after a rather detailed discussion of the ingredient of possession in the grounds of judgment, prior to calling the defence, the learned judge failed to take the next expected step of evaluating the ingredient of trafficking. Why there was no mention of the latter ingredient in the grounds of judgment, let alone carry out a maximum evaluation of it, was beyond us. As said above, if not for a mere mention in the notes of proceedings (and not in the grounds of judgment) at p 45 of the appeal record of the invocation of the presumptive provision, we would have been at a loss as to the route undertaken pertaining to the establishment of the ingredient of trafficking. To exacerbate matters, again in the grounds of judgment when discussing the evidence at the defence stage, the learned judge made no attempts to discuss the facts that led to the invocation of s 37(da) of the Act or make a maximum evaluation of the evidence in relation to it. This failure went against the enunciation of the Federal Court in *Balachandran v Public Prosecutor* [2007] 5 MLJ 1; [2005] 1 CLJ 85 in that a presiding judge must undertake a maximum evaluation exercise at the end of the prosecution and again at the defence stage. Instead he merely stated in the grounds of judgment, regarding the ingredient of trafficking, in the following manner:

> Sebagai kesimpulan, mahkamah memutuskan bahawa pembelaan tertuduh telah gagal menimbulkan keraguan yang munasabah terhadap kes pihak pendakwaan dan juga atas imbangan kebarangkalian. Tertuduh telah gagal mematahkan anggapan di bawah s 37(da) ADB 1952.

[10] The want of evaluation of the trafficking ingredient aside, the above statement is downright confusing, as it conveys the message that the appellant had failed to create a reasonable doubt against the prosecution's case and also on a balance of probability. Does it mean that the issue of balance of probability was in relation to the presumption section or that the appellant must rebut the prosecution's case on a reasonable doubt and also on a balance of probability? The want of maximum evaluation on the ingredient of trafficking (to be discussed later) and confusing burden on the appellant was of no help either to the prosecution's case.

[11] We now delve more thoroughly as to why we acquitted him and set aside the conviction for the first charge. To satisfactorily supply the reasons we need to recap the evidence. For starters we found that the prosecution had failed to establish the ingredient of knowledge when arrested with P9. In order for the prosecution to establish possession, it must in the first place establish that the appellant was aware of the presence of the package. This is the custody and control stage. Having satisfied this requirement the ingredient of knowledge will be next.

[12] From the grounds of judgment it was obvious that the learned judge held the view that the appellant knew of P9 being under the driver's seat. After a careful perusal of the notes of proceedings and the grounds of judgment we were unable to agree with him. We found, inter alia, that:

(a) the learned judge had chosen to ignore the evidence of PW5 who testified that the cannabis could be inserted from the rear part of the seat. He testified:

> Saya setuju yang eks P9 boleh dimasukkan dari bahagian penumpang di belakang. Kalau ada penumpang yang sorokkan di situ OKT mungkin tidak tahu. Saya tidak boleh nafikan. Sesiapa pun boleh letak eks. Di dalam teksi itu.

Rather than accepting PW5's evidence the learned judge had instead opined that P9 could also be inserted from the front side of the driver seat, when discussing the issue of seat adjustment. With the evidence admitting to two or more inferences, and by refusing to submit to PW5's testimony the learned judge had failed to draw the inference that was most favorable to the appellant (*Public Prosecutor v Mohd Radzi Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457). This was certainly disastrous to the appellant and an erroneous approach on the part of the learned judge;

(b) the learned judge found that there was no reason why any passenger would place the package at the driver's seat. The fact that the contents of the package were valuable led the learned judge to state that it was *impossible* for any passenger to leave the package under the seat. The learned judge even went one step further by stating that the space under the driver's seat was not meant for passengers to keep their things. The learned judge had misdirected himself here, as what was relevant was that things could be hidden under the driver's seat, and not that the space was meant for passenger usage. The strong views held by the learned judge, regarding the abandoning of the package under the seat by a passenger was without substance as there could have been many reasons why any passenger would do that. What was staring in the face of the learned judge, and could not be ignored, was that no less than four passengers were picked up within those few hours by the appellant when plying his trade, before being arrested, and that the package was capable of being inserted under the driver's seat from the rear. But the learned judge chose to ignore them and in the course of it had seriously misdirected himself. If we may add it was not incumbent on the appellant to supply the reasons why passengers leave things behind. He was only required to rebut the prosecution's case on a reasonable doubt; and

(c) the learned judge also made much of the evidence pertaining to the adjustment of the driver's seat by the appellant despite there being no mention of it at the prosecution's stage. This issue cropped up at the

defence stage in the course of the cross-examination. The appellant agreed that he needed to adjust the driver's seat for his own comfort before driving the said taxi, but in no uncertain terms denied seeing the package when in the act of adjusting it. Yet despite the dearth of evidence, the learned judge found that the appellant could know of the plastic bag placed and contents under him, when adjusting his seat. The learned judge wrote:

> ...Tertuduh sememangnya mengetahui kewujudan eksh P9 berada di bawah kerusi tempat duduk pemandu. Ini kerana tertuduh bersetuju semasa disoal balas bahawa beliau perlu untuk *adjust*/ubah tempat duduk pemandu supaya boleh memandu dengan selesa. Ini menunjukkan bahawa tertuduh boleh mengetahui kewujudan eksh. P9 dan kandungan. (Emphasis added.)

[13] We found this view totally intolerable, as to equate the act of adjusting the driver's seat with capability of seeing the package under the seat, was a view that lacked substance. Adjusting the driver's seat is a normal conduct by any person who wants to drive someone else's motorcar (a taxi in the present case). There is nothing in the notes of proceedings of evidence adduced that at 1am the appellant was looking down, that the lighting was sufficient, that his head was not looking straight ahead when he pulled the lever etc.

[14] It was beyond us how the learned judge could have arrived at that finding of fact that he saw P9, when there was not an iota of evidence submitted to support the above conclusion. We concluded that the learned judge was in error when delving into the realm of speculation and arriving at the unsubstantiated conclusion that the appellant saw the package.

[15] Since the appellant had clearly evinced that he did not see the package, and there was no evidence to say otherwise, we then must accept the fact that he indeed did not see the package. Even if we were not to believe him but if a reasonable doubt had been raised he was thus entitled to an acquittal (*Mat v Public Prosecutor* [1963] MLJ 263; [1963] MLJ 263).

[16] Since the prosecution had failed to establish that the appellant knew the package was under his seat it would naturally follow that he would not know the contents. End of matter.

[17] On the other hand, to be on the safe side, let us assume that he saw the package, thus begging the question whether he knew the contents, a need arises to prognose this. It is a fact that the cannabis was placed inside a plastic bag, with the words 'the store' imprinted on it. The compressed cannabis was wrapped in transparent plastic package (outer layer) and aluminum foil (inner layer). A yellow cellotape was also found attached to it. PW5 testified that the

cannabis could not be seen and ordinary people would not know it was cannabis. Yet despite the above testimony the learned trial judge concluded that mens rea had been established by direct evidence, and remarked:

> Dengan hormat, mahkamah tidak dapat bersetuju dengan hujah dan penilaian keterangan seperti yang dihujahkan oleh peguambela terpelajar. Adalah tidak dapat dipertikaikan bahawa tertuduh mempunyai milikan sebenar dadah yang menjadi hal perkara pertuduhan. Bagi pertuduhan pertama, keterangan yang ada menunjukkan:
>
> (a) ekshibit P9 dijumpai di bawah tempat duduk pemandu teksi yang dipandu seorang diri oleh tertuduh;
>
> (b) teksi tersebut telah diserah kepada tertuduh oleh SP3 sebelum kejadian; dan
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> (c) *ekshibit P9 ditemui oleh SP3 (typographical error?) dalam bungkusan plastik lutsinar serta berselotape. Dengan itu. kandungannya boleh dilihat dari luar.*

[18] Making a statement that the appellant had possession of P9, just because it was under the driver seat and that he was the sole driver of the taxi, was a bare statement without more. Unless knowledge is proved, an item however close to a person, could just be miles away. The same argument applies pertaining to the handing over of the vehicle to the appellant by PW3 prior to the arrest. Handing over does not carry with it the knowledge of the complete items that goes with the vehicle especially the hidden ones. The last finding that P9 could be seen from the outside by the naked eye was confusing, as we were unsure whether the learned judge meant to say of the package, which was the content of the plastic bag, or the drugs. Having perused the grounds of judgment in its entirety, together with the notes of proceedings, we found nothing to indicate that the cannabis could be seen by the naked eye. This has to be about the only conclusion we could arrive at as PW5 had clearly stated that the cannabis could not be seen or known to be cannabis by a man on the street. His testimony reads as follows:

> Setuju eksh P9 berbalut *plastic* dan kertas timah. la dibalut dengan selotape kuning. Setuju tak boleh nampak dari luar. Setuju jika orang biasa melihat ketulan dan daun mampat itu, dia tidak tahu ianya adalah *cannabis*.

[19] With the benefit of the doubt given to the appellant it must mean that only the package could be seen. With the finding of knowledge being founded on direct evidence, and no evidence of the appellant knowing of the presence drugs having been established conclusively, (and in fact the reverse held true), we were satisfied that the prosecution had failed to establish the ingredient of possession. In *Warner v Metropolitan Police Commissioner* [1968] 2 All ER 356, Their Lordships had remarked:

A If there is some momentary custody of a thing without any knowledge or means of knowledge of what the thing is or contains then, ordinarily, I would suppose that there would not be possession.

B **[20]** Alluding to another approach, to establish that the appellant had knowledge of P9, the learned deputy public prosecutor had referred to *Mohd Zaiham Mislan v Public Prosecutor* [2010] 1 CLJ 1and *Public Prosecutor v Abdul Rahman Akif* [2007] 5 MLJ 1; [2007] 4 CLJ 337, on account of him being in control of the taxi. In the latter case the respondent was charged and convicted C of trafficking in dangerous drugs under s 39B(1)(a) of the Act. The drugs weighed 4826.9g of cannabis, as defined under s 2 of the Act. One package was found under the driver's seat and two packages under the front passenger's seat. Altogether there were five blocks of compressed plant material confirmed to be cannabis. In convicting the respondent, the court held that the respondent D must have had custody and control of the drugs, since he was alone at the material time and had been in possession of the car for some seven months prior to his arrest. Incidentally this car was a rented vehicle and not a taxi.

[21] Distinguishing the facts of the present appeal to *Abdul Rahman Akif*, it E is incontrovertible that the appellant here borrowed the taxi from PW3 on 24 July 2005 at about 1am. He was arrested at about 4.20am on the same date. In a word he had the vehicle only for 3 hours and 20 minutes, as compared to the seven months in *Abdul Rahman Akif*. The amount seized from the taxi was small ie literally about 10% of the amount compared to *Abdul Rahman Akif*'s F case. To have missed a small package hidden away under the seat was not an inherently incredible suggestion. To be totally oblivious of a large amount of cannabis, inserted under the passenger and driver's seats in the course of the seven months, when having custody and control of the vehicle for such a long time, was an absurd defence. The Federal Court opined that little effort was G required to uncover what was contained in the packages. Another distinguishing factor is that, the vehicle in question here is a taxi, and as confirmed by PW5 the compressed slab could possibly have been placed or inserted by any passenger when sitting at the rear passenger seat. There was evidence adduced to show that some of the passengers were sent to Kg Melayu, H Majidee and Taman Sentosa, and prior to using the taxi it was driven by PW3. In *Abdul Rahman Akif* the issue of any member of the public entering the vehicle and leaving any package behind did not arise.

[22] We now discuss the ingredient of trafficking on the *hypothetical premise* I that the prosecution had successfully established the ingredient of possession. PW5 had testified, and confirmed by the appellant that he was outside the taxi, when the search was conducted. In fact the arrest took place when he was moving away from the taxi and walking towards the direction of the row of shops. Thus he was walking away from the drugs. At that stage there was no

third party around, which could bring that possession to another level ie a transaction with a third party. In a gist, at that precise moment, he merely was in passive possession of the drugs even though the amount of drugs was above the presumption level (*Public Prosecutor v Haling Arala Jimjani* [2008] 5 MLJ 331; [2008] 4 CLJ 163). There was no tell-tale sign of overt act, conduct or evidence which could upgrade that possession to trafficking. Even PW5 had confirmed that the appellant did not put up any struggle or attempt to flee from the scene, as in *Haling Arala Jimjani*, but only looked stunned and surprised when arrested. Even though the appellant was alleged to have pushed away the hands of PW5 at the time of arrest, there was nothing to indicate that his reaction was not pertaining to the drugs found on him rather than of P9. This is one of the dangers of including a minor charge to a capital punishment charge; and without such evidence to prove that the conduct was P9 related the benefit of the doubt regarding this physical reaction, must be given to the appellant. On the above grounds we were satisfied that he had rebutted the presumption of trafficking on a balance of probability.

[23] With knowledge not established, and the ingredient of trafficking easily rebutted, even had possession been established, we had no hesitation in allowing the appellant's appeal for the first charge, and dismissing his appeal for the second. The order made by the High Court for the first charge was set aside and that of the second charge affirmed.

Appeal against first charge allowed and appeal against second charge dismissed.

Reported by Kohila Nesan